

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND COMPOUNDING ) MDL NO. 13-02419-RWZ  
PHARMACY CASES LITIGATION )

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BEFORE: THE HONORABLE RYA W. ZOBEL AND  
THE HONORABLE JENNIFER C. BOAL

**STATUS CONFERENCE**

John Joseph Moakley United States Courthouse  
Courtroom No. 12  
One Courthouse Way  
Boston, MA 02210

February 17, 2015  
2:00 p.m.

Catherine A. Handel, RPR-CM, CRR  
Official Court Reporter  
John Joseph Moakley United States Courthouse  
One Courthouse Way, Room 5205  
Boston, MA 02210  
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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on February 17, 2015.)

THE COURT: Good afternoon. Please be seated.

COURTROOM DEPUTY CLERK URSO: This is the New England Compounding. It's MD-13-2419.

THE COURT: Those counsel who are only participating by telephone, I think unless you agree to come up and experience the cold and the intense snow, you're not going to be allowed to talk on the phone anymore. All of the Boston and present counsel agree to that.

(Laughter.)

THE COURT: So, Ms. Johnson, I have here three documents, Plaintiffs' Steering Committee's motion to schedule oral argument, which I have allowed, and will go to Liberty, right?

MS. JOHNSON: It is, your Honor. Although, actually, in speaking with counsel for Liberty this morning, both sides have agreed to submit that on the papers, unless your Honor would like to hear argument.

THE COURT: Well, it pertains primarily to the

1 amended petition of Mr. Austin.

2 MS. JOHNSON: That's correct.

3 THE COURT: Okay. So, I'm happy to do that. So,  
4 that goes by the boards.

5 Then I have the jointly-proposed agenda for the  
6 meeting and Plaintiffs' Steering Committee's report for the  
7 status conference.

8 MS. JOHNSON: Yes, your Honor.

9 THE COURT: Where do you want to start?

10 MS. JOHNSON: I would start with the agenda.

11 THE COURT: Okay. Now, I have one other thing, which  
12 is not on the agenda and you don't know about. I have here  
13 two copies, I think, of a letter, one for plaintiff and one  
14 for the requisite defendants, who I think -- the South  
15 Carolina defendants. Is there such a thing?

16 MS. JOHNSON: North Carolina defendants, your Honor?

17 THE COURT: "SC."

18 Anyhow, here is the letter for you and for -- you can  
19 make a whole bunch of copies. It's a letter that was  
20 addressed to me and it is a person who says he was injured and  
21 he wants to get paid. That's the essence of it. And he  
22 should get paid, and it requires a response, and I would  
23 appreciate if the plaintiffs' counsel would respond to this  
24 letter with a copy to defense counsel and figure out who the  
25 defendant is who should get this.

1 MS. JOHNSON: We will do that, your Honor. Thank  
2 you.

3 THE COURT: Thank you.

4 (Letter handed to Attorney Fennell.)

5 THE COURT: Now I will hear from you, Ms. Johnson,  
6 concerning the agenda.

7 MS. JOHNSON: Thank you, your Honor.

8 We can skip motions for oral argument, then, and turn  
9 to the report to the Court, and we'll start first with the  
10 status of mediation efforts.

11 We are pleased to report that the mediation efforts  
12 of the Virginia cases was successful and that a final  
13 settlement agreement has been executed by the plaintiffs and  
14 defendants. And if I may approach, your Honor.

15 THE COURT: Well, that relieves me of another burden.

16 (Attorney Johnson hands document to the Court.)

17 THE COURT: Before the mediator -- one of the two  
18 mediators went away on a well-deserved vacation, he left for  
19 me a sealed envelope, not to be opened until requested by the  
20 mediators, which, as I understand -- and I do not know what  
21 the actual document is, but as I understand it, it is the  
22 mediator's suggestion for settlement, the figure. So, I  
23 understand I may now give this to the shredders.

24 MS. JOHNSON: Yes, your Honor, I believe that you  
25 may.

1 THE COURT: It will be done.

2 In this connection, I do wish to thank the mediators,  
3 both of them, Mr. Klein -- Judge Klein and Eric Green, who  
4 worked unbelievably hard and incredibly effectively. So, I am  
5 happy to hear your report.

6 MS. JOHNSON: We would also like to thank the Court,  
7 both Judge Zobel and Judge Boal, for their efforts because we  
8 do think that played a significant role in ultimately bringing  
9 this to conclusion. So, thanks to you both.

10 We also, on the mediation front, are pleased to  
11 report that significant progress has been made in resolving  
12 claims against the Unifirst Corporation and that we did spend  
13 a considerable amount of time working over the weekend on  
14 that.

15 THE COURT: I'm sorry, who is the defendant?

16 MS. JOHNSON: Unifirst.

17 THE COURT: Oh, Unifirst.

18 MR. SOBOL: These two (indicating).

19 THE COURT: I should have known because they usually  
20 don't hide in the second tier.

21 MR. BRACERAS: Those seats were taken.

22 (Laughter.)

23 MS. JOHNSON: That brings us, then, your Honor, to  
24 the status of the insurance declaratory judgment actions.

25 The actions before Judge Saylor involving insurance

1 coverage for Ameridose are ongoing. There are also -- in the  
2 insurance dec action involving Liberty, Liberty has filed an  
3 opposition to the motion for summary judgment there quite  
4 recently. The Court has not yet ruled on that motion,  
5 however.

6 Turning to discovery. The PSC has made a decision,  
7 with the Court's permission, that given the number of  
8 defendants and parties in this MDL in general, that as a  
9 procedural matter, we have started docketing notices of  
10 depositions to ensure that everyone is provided with copies of  
11 that information, so long as the Court does not object,  
12 because it will, I suppose, clutter the docket perhaps a bit,  
13 but our thought was that it was better to make sure that  
14 everyone was afforded notice of these depositions as they're  
15 now being scheduled.

16 THE COURT: I think that's okay. It doesn't harm us  
17 like sealed documents do.

18 MS. JOHNSON: We try not to do that.

19 Then that takes us to 3(b), the in-camera review of  
20 Saint Thomas Entities' trust agreement, and we did discuss  
21 that with -- at the hearing before Judge Boal this morning.  
22 So, I don't think there's more that needs to be said there.

23 THE COURT: Okay.

24 MS. JOHNSON: 3(c), Judge Boal heard argument this  
25 morning on both c(i) and c(ii). On c(iii) is inadvertently

1 listed again. That motion has already been withdrawn. So  
2 that you don't need to worry about.

3 Which brings us to the status of the litigation  
4 track, No. 4. See how we're flying through this morning, your  
5 Honor. So much easier when everyone settles.

6 THE COURT: I'm sorry?

7 MS. JOHNSON: I said we're flying through this  
8 morning. It's much easier when everyone settles.

9 THE COURT: That's true. We encourage it.

10 MS. JOHNSON: We do.

11 In terms of the status report, the PSC did file a  
12 status report this morning. We filed it a little later in  
13 time than we hoped because we wanted to update some  
14 information in there. It does do three things:

15 It addresses the status of the mediation efforts,  
16 which we've already covered. And, second, it provides a  
17 census of cases on file in the MDL against clinic defendants,  
18 and that's at Page 2 of the status report. I won't read the  
19 whole chart, your Honor, but I'll make a few observations  
20 about it.

21 The defendant in the -- the clinic defendant in the  
22 MDL with the most cases naming it is Saint Thomas. That is  
23 true and has been true for some time.

24 The second-most prevalent clinic is the Premier  
25 Clinic. That's a New Jersey clinic. That's also been true

1 for some time.

2 We then have another Tennessee clinic, Specialty  
3 Surgery Center, and what's different about this chart from the  
4 last time that we looked is that you'll see Box Hill Surgery  
5 System, a Maryland clinic, now has eight cases on file in the  
6 MDL. Ms. Dougherty may want to address the...

7 (Discussion off the record.)

8 MS. DOUGHERTY: Good afternoon, your Honor.

9 One thing that I would just mention with respect to  
10 the landscape --

11 THE COURT: I don't think it's on. You just turned  
12 it off.

13 MS. JOHNSON: There you go.

14 MS. DOUGHERTY: Good afternoon, your Honor.

15 One thing I would like to just mention with respect  
16 to Box Hill and the landscape, as it might change in the  
17 future, is that with Maryland being a state that allows for a  
18 three-year statute of limitation, what we foresee is the  
19 number of cases filed against Box Hill increasing  
20 significantly over the next few months.

21 I personally represent 29 victims and have -- since  
22 our 93A demand to Box Hill, I believe that's going out today,  
23 30 days from then, if we are unable to resolve, which I  
24 anticipate given the current information that's been provided  
25 by Box Hill's counsel, we will also be filing additional cases

1 there.

2 As you might recall, there was a motion to dismiss  
3 that was filed in those cases and it was stayed by your Honor  
4 on the record. Currently the counsel of record in those cases  
5 is working on a stipulation with respect to how to move  
6 forward given your Court's guidance on your prior decisions  
7 that you've made on various counts.

8 So, we anticipate a stipulation will be filed related  
9 to that and that there may be some remaining issues that Box  
10 Hill may ask to be heard on at the next status conference.

11 THE COURT: Thank you.

12 MS. DOUGHERTY: You're welcome.

13 MS. JOHNSON: Then two more observations about that  
14 chart, your Honor. One is that those clinics who have now  
15 settled and where the settlement agreements are finalized and  
16 have been submitted as part of the bankruptcy process are not  
17 listed in that chart.

18 So, there are, in fact, a large number of cases  
19 naming Insight as a defendant, but as those have now been  
20 resolved by the settlement agreement, we didn't present those  
21 here as well.

22 And, secondly, you'll notice in that chart, your  
23 Honor, it very quickly devolves into clinics with three or  
24 fewer cases against them.

25 The PSC, in looking at that and also being mindful of

1 your Honor's suggestion that we aim for a trial by the end of  
2 this year, has made some efforts to engage with defense  
3 counsel and plaintiffs' counsel in those actions to suggest  
4 that those cases where there are really one or two, perhaps  
5 three cases, enter into an agreed-upon -- jointly agreed-upon  
6 stay that will temporarily stay those cases while the PSC and  
7 others focus on litigating and getting trial-ready. Some of  
8 the cases that we expect will be cases appearing towards the  
9 top of the list.

10 THE COURT: That sounds like a very practical thing  
11 to do.

12 MS. JOHNSON: Glad you approve.

13 And then the third thing that the status report does  
14 is to preview two things for your Honor, and understanding  
15 that these are issues that we have not yet formally moved the  
16 Court on, it really is intended to be a preview. We  
17 understand not all the parties necessarily agree to the PSC's  
18 proposals, but we do want to introduce them to you.

19 The first, your Honor had requested at the last  
20 status conference that the PSC propose a way to more  
21 efficiently coordinate dealing with motions to dismiss.

22 In the process of thinking that through, we've  
23 realized there may also be some need for efficiently  
24 coordinating summary judgment motions. So, the PSC has put  
25 together a proposed case management order that does a few

1 things:

2 First, it proposes that the PSC will amend the master  
3 complaint to remove certain counts that this Court has already  
4 ruled on.

5 Second, it proposes that anyone filing a motion to  
6 dismiss or motion for summary judgment would be required to  
7 engage in some basic due diligence, meaning reading the  
8 Court's earlier orders to consider whether the Court's  
9 decisions in those orders may inform the decision to move to  
10 dismiss particular causes of action. Also, to make some  
11 efforts to identify cases with similar facts or really  
12 questions of law.

13 So, for example, an effort -- if a Tennessee  
14 defendant wanted to move to dismiss, they would be required to  
15 make an effort to identify other cases involving similar  
16 Tennessee state law claims, as an example.

17 That proposed case management order was circulated to  
18 all defense counsel in the MDL for comment last week. We have  
19 a meet-and-confer on that matter scheduled for tomorrow.

20 Our hope is that we will then be able to file with  
21 the Court a joint proposal for dealing with these matters. If  
22 not joint, though, our suggestion, as will be included in the  
23 proposal case management order, is that the parties  
24 simultaneously file competing proposals, in the hopes that we  
25 could get this moving down the road a bit faster.

1 THE COURT: Okay.

2 MS. JOHNSON: And then, finally, the Court had  
3 suggested and the Plaintiffs' Steering Committee heartily  
4 agrees that we ought to be looking for an expedited trial in  
5 November or no later than December of this year. The PSC  
6 believes that that is doable, your Honor. It does, however,  
7 take some considerable thought into what that case should be,  
8 which cases may be appropriate for expedited treatment.

9 THE COURT: Are you thinking of one plaintiff or a  
10 group of plaintiffs?

11 MS. JOHNSON: I don't have the answer for that for  
12 you today, your Honor, but I'll tell you this. We have  
13 certainly thought about which type of case would have an  
14 impact on a large number of plaintiffs. And so, I don't think  
15 it would come as a surprise to anyone to suggest that perhaps  
16 a case against Saint Thomas may be at the top of the list  
17 given the number of cases against Saint Thomas out there.

18 That said, I do not mean to be suggesting that the  
19 PSC has formulated a definitive position on that today, but,  
20 rather, make the observation, as your Honor is suggesting,  
21 we're considering how we can try one case that will have a  
22 broad impact. The PSC intends to have a -- intends to propose  
23 a schedule leading to a December trial and propose that  
24 schedule by March 1st, your Honor.

25 THE COURT: Okay.

1 MS. JOHNSON: That brings us to 4(b), which is the  
2 PSC's letter to Judges Zobel and Boal regarding Judge Nieman.

3 The PSC ECF'd and also hand delivered copies to the  
4 Court of a letter earlier this week -- oh, actually, I'm  
5 sorry. The courtesy copies I think were only sent today and  
6 ECF'd over the weekend because ECF had been down on Friday for  
7 a while. That letter --

8 THE COURT: Maintenance, just like the T.

9 MS. JOHNSON: Hopefully, it doesn't take 30 days to  
10 get it running again.

11 THE COURT: They did it all on one afternoon this  
12 weekend. It was done this weekend.

13 MS. JOHNSON: Yes. So, that letter, to share with  
14 those who haven't read it, just an excerpt, the PSC, the  
15 Trustee and the Official Creditor's Committee would all be  
16 very pleased to have Judge Nieman fill the role of the appeals  
17 administrator.

18 That letter also addresses what I think was the  
19 Court's conception that Judge Nieman's decisions, which  
20 themselves are appeal of an award, would also be reviewed by  
21 this Court, and the letter presents, we think, a compelling  
22 case for why in this circumstance that additional level of  
23 review is neither required by the statute or rules governing  
24 magistrate judges, nor as a practical matter appropriate in  
25 these circumstances, given the interest of getting money out

1 to victims as soon as possible.

2 So, we present that letter for the Court's  
3 consideration and we look forward to hearing from both Judge  
4 Zobel, Judge Boal and Judge Nieman on it.

5 MAGISTRATE JUDGE BOAL: I think -- except I  
6 appreciate the letter and dealing with the concerns that I had  
7 raised. I don't think -- well, my concern didn't come from a  
8 feeling that the plan required appeal to Judge -- or offered  
9 the ability to appeal to Judge Zobel. The concern was whether  
10 Judge Nieman would have the authority or someone else, a  
11 private individual appointed in the same position, but I think  
12 as a practical matter, the plan makes a lot of sense and is  
13 very efficient, and Judge Nieman would be excellent in the  
14 role.

15 So, I think -- and we can talk about it, but I think  
16 our thought was that -- well, I think my question to you is  
17 what would your proposal be going forward in terms of the  
18 appointment of Judge Nieman? Would you be filing a motion to  
19 appoint him once the plan is confirmed or how would you  
20 attempt to effectuate that?

21 MR. ELLIS: Your Honor, this is Rick Ellis.

22 I think what the plan envisions --

23 THE COURT: Would you turn on your microphone,  
24 please.

25 COURTROOM DEPUTY CLERK URSO: It is.

1 MR. ELLIS: Is that okay?

2 THE COURT: Yes, thank you.

3 MR. ELLIS: I think what the plan envisions is after  
4 confirmation, we would make a motion under Rule 1636 for his  
5 appointment and you would enter that order and then he would  
6 be appointed.

7 THE COURT: Okay.

8 MS. JOHNSON: That brings us to No. 5, the status of  
9 the bankruptcy, and I'll ask Mr. Gottfried to address that.

10 MR. GOTTFRIED: Good afternoon, your Honor.

11 The status of the bankruptcy is as follows:

12 On Friday the trustee filed a plan supplement, which  
13 he also filed a notice of in this Court. That plan  
14 supplement, which is some 700 pages long, contained a tort  
15 trust agreement, claims resolution facility procedures, a  
16 provider claims resolution facility procedures, a High Point  
17 claims resolution facility procedures, the Insight claims  
18 resolution facility procedures, and the Inspira claims  
19 resolution facility procedures, as well as the Ameridose  
20 settlement agreement, ARL settlement agreement, the High Point  
21 settlement agreement, the Insight settlement agreement, the  
22 Inspira settlement agreement, the Victory settlement  
23 agreement, and the shareholder escrow and control agreement.

24 I'll just take a break from the report to say we join  
25 in thanking the Court and both Judge Klein and Eric Green for

1 their invaluable assistance in settling the Insight Virginia  
2 matters. So, thank you.

3 With that being filed, it's still expected that this  
4 week, hopefully, we will file an amended disclosure statement  
5 in advance of the hearing on February 24th in front of Judge  
6 Boroff, which is to, hopefully, approve the disclosure  
7 statement as amended that the trustee expects to file.

8 The objection deadline is today. There are a couple  
9 of objections that have already been filed. We'll see what  
10 the day brings with respect to other objections, and we're  
11 hopeful that the plan --

12 THE COURT: What's the nature of the objections?

13 MR. GOTTFRIED: There's one objection, for example,  
14 by the U.S. trustee, which I think I would let speak for  
15 itself. There's been an objection by Liberty I've seen and --  
16 you know, we're hopeful that we'll be able to address those  
17 with Judge Boroff and maybe with some of the parties and  
18 resolve them even before the hearing, at least some of them.

19 After the disclosure statement, typically, a hearing  
20 to confirm the plan would be held maybe 45 to 60 days.  
21 Obviously, that's Judge Boroff's call to set that hearing  
22 date. In this case because of the complexity, some of those  
23 times have run slightly longer than that and we'll just have  
24 to wait and see what he actually decides in terms of what the  
25 most appropriate date is for a hearing, and that's the current

1 status, your Honor.

2 THE COURT: Thank you.

3 Anybody else wish to add anything to that?

4 (No response.)

5 THE COURT: Okay.

6 MS. JOHNSON: In terms of appeals, your Honor, there  
7 is one appeal pending before -- it may be styled as two, but  
8 involving one substantive set of facts, which is an appeal by  
9 the Virginia plaintiffs to orders issued earlier in this case.  
10 The Insight settlement now will moot that appeal.

11 I understand the parties are in the process of  
12 discussing what appropriate types of withdrawal or  
13 stipulations need to be filed to accomplish that end.

14 Similarly -- and you may have noticed on the agenda  
15 today, we have removed from the agenda listings of motions  
16 filed either by the Virginia plaintiffs or Insight. Those are  
17 still currently technically pending in the docket, but, again,  
18 counsel is working through the process to figure out how we  
19 effectively withdraw those motions.

20 THE COURT: Okay.

21 MS. JOHNSON: And that brings us to the schedule for  
22 future status conferences. We do have conferences scheduled  
23 for March and April, but would request that the Court choose a  
24 date in May.

25 THE COURT: Lisa, the end of the month.

1           COURTROOM DEPUTY CLERK URSO: Okay. So, the 25th  
2 will be Memorial Day. Do you want to have it like that  
3 Tuesday after or before that?

4           THE COURT: Well, to the extent that people are  
5 traveling, maybe a couple of days after that.

6           COURTROOM DEPUTY CLERK URSO: After?

7           THE COURT: Yes.

8           COURTROOM DEPUTY CLERK URSO: So, do you want to go  
9 with maybe May 28th? That's a Thursday. That week is open.  
10 So, whatever counsel would prefer, what day of the week it  
11 would be.

12           MS. JOHNSON: The 28th works well for the Plaintiffs'  
13 Steering Committee.

14           THE COURT: Would anybody object to that?

15           (No response.)

16           THE COURT: And the same drill, that any motions --  
17 at 2:00, Lisa?

18           COURTROOM DEPUTY CLERK URSO: Yes, 2 o'clock, on May  
19 28th.

20           THE COURT: We will have a motion hearing first to  
21 the extent that there are any motions that need to be heard  
22 and then a status conference after that.

23           Should we include a hearing before Judge Boal at the  
24 time?

25           MS. JOHNSON: I suspect that by then we likely will

1 have additional motions.

2 MAGISTRATE JUDGE BOAL: So, we'll hold it as a  
3 control day and, obviously, if there's nothing pending, we'll  
4 cancel it.

5 MS. JOHNSON: So, that brings us, then, your Honors,  
6 to C, fully-briefed motions. I don't know that any of these  
7 need to be addressed today. We have listed them as they are  
8 motions pending on the Court's docket.

9 In terms of item D, briefing in progress, there are  
10 two dispositive motions that are in the process of being  
11 briefed. First, the Box Hill motion to dismiss and, as we  
12 mentioned earlier, counsel is working on a stipulation that  
13 would specifically address how the Box Hill briefing may  
14 proceed.

15 And, secondly, Cincinnati Pain Management's motion to  
16 dismiss. I understand -- I don't believe counsel for  
17 Cincinnati Pain is present in the courtroom today, but, in any  
18 event, the parties do not contemplate arguing them today.

19 THE COURT: Are you interested in that?

20 MR. ORLANDO: I am here for Cincinnati, but I agree  
21 with the plaintiffs.

22 THE COURT: Okay.

23 COURT REPORTER: Can I just have your name, please?

24 MR. ORLANDO: Steven Orlando for Cincinnati Pain  
25 Management.

1 MS. JOHNSON: My apologies for not seeing Mr.  
2 Orlando.

3 MR. ORLANDO: It's all right.

4 MS. JOHNSON: And that's it.

5 THE COURT: Does anyone wish to add anything to Ms.  
6 Johnson's report?

7 MS. DOUGHERTY: Just briefly, your Honor, on No. 9(a)  
8 and (b). You heard argument on the Luna case with respect to  
9 a variety of issues that were raised, one particularly being  
10 the personal representative being appointed the personal  
11 representative of the estate. That has been resolved. We've  
12 worked with counsel to resolve the remaining issues and we  
13 expect -- they have advised us today that they're going to  
14 answer the complaint 21 days from today. And so, I believe  
15 the other matters are at this point moot.

16 THE COURT: Does that mean that the motion has gone  
17 by the boards?

18 MS. DOUGHERTY: I believe that's correct, your Honor.  
19 We've entered a stipulation --

20 THE COURT: This is 9(a) and (b) or 9(a) only?

21 MS. DOUGHERTY: (a) and (b).

22 THE COURT: Both of them.

23 MS. DOUGHERTY: Thank you, your Honor.

24 THE COURT: Thank you.

25 All right. I think that I need to deal with Liberty

1 and, otherwise, look forward to the next meeting, unless  
2 something else comes up in between.

3 And I would ask you, please, to send some kind of a  
4 response to the gentleman who is concerned about getting his  
5 money.

6 MS. JOHNSON: Yes, your Honor. We will do that.

7 THE COURT: And I will file that letter -- I guess I  
8 don't really want to file it as a public document. I'll just  
9 hold it with my papers, if that's okay.

10 MS. JOHNSON: No objection from the plaintiffs.

11 THE COURT: Anything else? Anybody?

12 (No response.)

13 THE COURT: Well, thank you all very much.

14 MS. JOHNSON: Thank you.

15 THE COURT: Stay warm.

16 (Adjourned, 2:25 p.m.)

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## C E R T I F I C A T E

I, Catherine A. Handel, Official Court Reporter of the United States District Court, do hereby certify that the foregoing transcript, from Page 1 to Page 23, constitutes to the best of my skill and ability a true and accurate transcription of my stenotype notes taken in the matter of Multidistrict Litigation No. 13-02419-RWZ, In Re: New England Compounding Pharmacy Cases Litigation.

February 18, 2015  
Date

/s/Catherine A. Handel  
Catherine A. Handel, RPR-CM, CRR